Supreme Court, U.S.
FILED
MAY 16 1996
CLERK

No. 95-1679

In The
Supreme Court Of The United States
October Term, 1995

MASSACHUSETTS COMMISSION
AGAINST DISCRIMINATION,
Petitioner,

v.

CHAULK SERVICES, INC.,
Respondent.

BRIEF OF AMICUS CURIAE IN SUPPORT OF PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

DOUGLAS A. HEDIN
Attorney At Law
812 One Financial Plaza
120 South Sixth Street
Minneapolis, MN 55402
(612) 333-7700
Counsel of Record

JONATHAN L. GOULD
GOULD, LIVINGSTON, ADLER
& PULDA, P.C.
557 Prospect Avenue
Hartford, CT 06105
(860) 233-9821

Printed by
Brescia's Printing Services, Inc.
66 Connecticut Boulevard
East Hartford, CT 06108
528-4254

QUESTION PRESENTED

Whether a sex discrimination claim brought against an employer under Massachusetts' anti-discrimination statute, Mass. G.L. c. 151B, § 4 (1995), is preempted by the National Labor Relations Act, 29 U.S.C. §141 et seq. (1994 Ed.), when the factual setting of a case gives rise to a state law claim of sexual discrimination and an unfair labor practice charge under the NLRA.

LIST OF PARTIES

The Parties to the proceeding below were appellee-petitioner Massachusetts Commission Against Discrimination, defendants-appellees Petrina Doulamis Sullivan and International Association of Emergency Medical Technicians (EMTs) & Paramedics National Association of Government Employees (NAGE), American Federation of Labor-Congress of Industrial Organizations (AFL-CIO), and appellant-respondent Chaulk Services, Inc.

TABLE OF CONTENTS

Question Presented i

List of Parties ii

Table of Contents iii

Table of Authorities v

Opinion Below 1

Jurisdiction 1

Statutes and Constitutional Provisions Involved 1

Interest of the Amicus Curiae 1

Statement of the Case 2

Reasons for Granting the Writ 4

I. The Court of Appeals Decision Conflicts With Massachusetts Court Decisions Holding That Massachusetts' Anti-Discrimination Laws Fall Within The "Local Interest" Exception To Garmon Preemption. 4

II. Inasmuch As Preemption Here Would Deny Victims Of Discrimination The Ability To Obtain Their Full Rights And Remedies Under Anti-Discrimination Laws, It Wholly Inappropriate. 8

III. The Court Of Appeal's Decision Has Erroneously Applied The Law Of Federal Labor Preemption As This Court Has Interpreted It. 10

Conclusion 13

TABLE OF AUTHORITIES

Cases

Albemarle Paper Company v. Moody, 422 U.S. 405 (1975)

Alexander v. Gardner-Denver, 415 U.S. 36 (1974)

Beal v. Board of Selectmen of Hingham, 646 N.E.2d 131 (1995)

Belknap, Inc. v. Hale, 463 U.S. 491 (1983)

Brown v. Hotel & Restaurant Employees, International Union Local 54, 468 U.S. 491 (1984)

Consolidated Edison Co. of New York v. NLRB, 305 U.S. 197 (1938)

Farmer v. United Brotherhood of Carpenters and Joiners of America Local 25, 430 U.S. 290 (1977)

Fontaine v. Ebtec Corp., 613 N.E.2d 881 (1993)

Frick Paper Co., 319 NLRB No.3 (1995)

Heck's Inc., 215 NLRB 765 (1974)

Katz v. Massachusetts Commission Against Discrimination, 312 N.E.2d 182 (1974)

Lingle v. Norge Division of Magic Chef, Inc., 486 U.S. 399 (1988)

Linn v. United Plant Guard Workers of America, Local 114, 383 U.S. 53 (1966)

Massachusetts Electric Co. v. Massachusetts Comm'n Against Discrimination, 375 Mass. 160, 375 N.E.2d 1192 (1978)

Rideout v. Crum & Forster Commercial Ins., 633 N.E.2d 376 (1994)

San Diego Building Trades v. Garmon, 359 U.S. 236 (1959)

Sears, Roebuck and Co. v. San Diego County District Council of Carpenters, 436 U.S. 180 (1978)

Younger v. Harris, 401 U.S. 37 (1971)

Statutes

29 U.S.C. §§ 158(a)(1) & (3)(1994 Ed.)

29 U.S.C. § 160(c)(1994 Ed.)

29 U.S.C. § 401 et seq. (1994 Ed.)

42 U.S.C. § 2000e et seq. (1994 Ed.)

42 U.S.C. § 2000e-5(c) (1994 Ed.)

42 U.S.C. § 2000e-5(k) (1994 Ed.)

42 U.S.C. § 2000e-7 (1994 Ed.)

Mass. G.L. c. 151B, § 4 (1995)

Mass. G.L. c. 151B, § 9 (1995)

Miscellaneous

Douglas S. McDowell, NLRB Remedies For Unfair Labor Practices, Labor Relations and Public Policy Series, Report No. 12 (1974).

Heins, Massachusetts Civil Rights Law, 76 Mass. L. Rev. 26 (1991).

Opinion Below

The judgment of the United States District Court of the District of Massachusetts is not reported and is reprinted in Appendix hereto, Pet. App. 1A-4A. The opinion of the United States Court of Appeals for the First Circuit is reported at 70 F.3d 1361 (1st Cir. 1995). It is reprinted in the petitioner's Appendix hereto, Pet. App. 5A-74A.

Jurisdiction

The United States Court of Appeals for the First Circuit issued its opinion and judgment on November 27, 1995. Pet. App. 6A. The Commission's petition for rehearing and suggestion for rehearing en banc was denied on January 18, 1996. Pet. App. 75A-76A. The Petitioner invoked the jurisdiction of this Court under 28 U.S.C. § 1257(a)(1994).

Statutes and Constitutional Provisions Involved

The National Labor Relations Act (NLRA), 29 U.S.C. §158(1994); Massachusetts General Laws (Mass. G.L.) Chapter 151B, Sections 3, 4, and 5 (1994 ed.), set forth in Petitioner's Appendix at Pet. App. 98A-158A. 29 C.F.R. §1601.12 (1995) is set forth in Petitioner's Appendix at Pet. App. 159A-168A.

INTEREST OF THE AMICUS CURIAE

The National Employment Lawyers Association ("NELA") is a voluntary organization started in 1985 of over 2700 attorneys who specialize in representing persons involved in employment related controversies. Many of the NELA members' clients are also members of unions. These particular clients will be

significantly harmed if their rights to redress under employment discrimination laws are foreclosed by federal labor law preemption. Thus, NELA has a substantial interest in ensuring that this group of clients are not disadvantaged by any unduly broad and intrusive applications of federal labor law preemption.

NELA is qualified to brief this Court on the implications of its decision in this case. It has participated as amicus curiae in other cases involving employment laws, including Varity Corp. v. Howe, 64 U.S.L.W. 4138 (March 19, 1996), John Hancock Mut. Life Insurance co. v. Harris Trust & Savings Bank, 114 S.Ct. 517 (1993) and Firestone Tire & Rubber Co. v. Bruch, 489 U.S. 101 (1989).

The position NELA takes in the following brief has not been coordinated with, or financed by, the petitioner or her counsel. The parties have consented to the filing of this brief. Correspondence reflecting the parties' consent has been lodged with the Clerk.

STATEMENT OF THE CASE

In the fall of 1993 the International Association of EMTs and Paramedics, NAGE, AFL-CIO ("Union") was conducting a union organizing campaign at Chaulk Services, Inc. ("Chaulk"). A Chaulk employee at that time, Petrina Doulamis ("Doulamis"), became an advocate for unionization. In October, she and a fellow male employee, Eric Burgess, co-authored a letter to Chaulk management outlining their support for the union. Pet. App. 8A.

Thereafter, Doulamis became the target of disciplinary action for conduct which allegedly occurred at work. Pet. App. 44A. No such action was taken against Burgess. Pet. App. 44A.

Chaulk's actions prompted the Union to file unfair labor practice charges with the National Labor Relations Board ("NLRB" or "Board") on November 29, 1993 and again on December 6 and 9, 1993, alleging that Chaulk had discriminated against Doulamis because of her union activities. Pet. App. 8A-9A. Ultimately, these complaints were resolved when Chaulk and the Board reached a settlement agreement in March 1995. Pet. App. 10A-11A.

However, as a consequence of Chaulk's treatment of Doulamis, Doulamis filed a complaint with the Massachusetts Commission Against Discrimination ("MCAD") on December 1, 1993, alleging that Chaulk officials had violated Mass. G.L. c. 151B, § 4 by discriminating against her on the basis of her gender.

Chaulk then filed a motion with the MCAD on February 18, 1994 to dismiss Doulamis' claim for lack of subject matter jurisdiction. Its grounds were that the claim was preempted by the NLRA. Pet. App. 11A. Reasoning that the resolution of Doulamis' claim posed no problem of interference with the Board's jurisdiction, the MCAD issued an order denying Chaulk's motion. Pet App. 48A.

Thereafter, Chaulk filed suit in the United States District Court for Massachusetts seeking declaratory and injunctive relief barring the MCAD from hearing Doulamis' claim. Relying on Younger v. Harris, 401 U.S. 37 (1971), the District Court abstained from deciding the merits of Chaulk's preemption claim and dismissed the case. Pet. App. 3A-4A. On appeal, the United States Court of Appeals for the First Circuit reversed, finding that it was "readily apparent" from the face of Doulamis' complaint that it was preempted by the NLRA and therefore abstention was inappropriate. Pet. App. 36A-37A.

REASONS FOR GRANTING THE WRIT

NELA's primary basis for supporting the petitioner is that the decision of the Court of Appeals is inconsistent with the decisions of this Court and the Massachusetts Supreme Judicial Court which delineate the proper scope of federal labor law preemption. The Court of Appeals decision will further burden Massachusetts in its efforts to achieve full and effective enforcement of its fair employment practices laws. At the same time, it adds nothing in the way of shielding the NLRA from conflicting state regulation. Furthermore, the decision fails to give effect to the equally important national policy of eliminating discriminatory practices from the work place. Rather, the decision will only compound the harm caused by unlawful employment discrimination by denying to victims the full rights and remedies to which they are entitled under anti-discrimination laws. For these reasons, NELA supports the petitioner's request for review by this Court.

I. The Court of Appeals Decision Conflicts With Massachusetts Court Decisions Holding That Massachusetts' Anti-Discrimination Laws Fall Within The "Local Interest" Exception To Garmon Preemption

As the petitioner explained in its brief, the Massachusetts courts have already concluded that its anti-discrimination laws are not preempted by the NLRA. Massachusetts Electric Co. v. Massacusetts Comm'n Against Discrimination, 375 Mass. 160, 173-77, 375 N.E.2d 1192 (1978). At least one of the reasons for the Court's decision was Massachusetts' important interest in enforcing its own laws against discrimination. Id. at 174.

Although the Court of Appeals agreed that Massachusetts has a significant interest in protecting its employees from sex discrimination, its decision directly conflicted with the holding of the Supreme Judicial Court in Massachusetts Electric Co., Pet. App. 20A. The Court should grant the petitioner's writ on this basis alone.

Furthermore, Massachusetts' long history of support for anti-discrimination laws demonstrates that this is a concern deeply rooted in local feeling and responsibility. Under San Diego Building Trades v. Garmon, 359 U.S. 236 (1959), the lead case on NLRA preemption, this is an interest which normally exempts a state law from the preemptive effects of the NLRA.

Garmon established a basic framework for courts to use in analyzing whether state law is preempted by federal labor law. It held that:

> [w]hen it is clear or may fairly be assumed that the activities which a State purports to regulate are protected by § 7 of the National Labor Relations Act, or constitute an unfair labor practice under § 8, due regard for the federal enactment requires that state jurisdiction must yield.

Garmon, 359 U.S. at 244.[1]

---

[1] Section 7 of the NLRA guarantees employees the right to self-organization and the right to engage in concerted activities for purposes of collective bargaining. Section 8 enumerates unfair labor practices which § 10(a) of the Act empowers the Board to enjoin. Section 8(a)(1) makes it an unfair labor practice for an employer to interfere with

However, the Garmon Court also recognized that Congress did not intend to preclude state regulation in all instances where state law and federal labor law might overlap. Thus, important exceptions to the Garmon rules apply where state regulation is (1) of only "peripheral concern" to the NLRA or (2) touches:

> . . .interests so deeply rooted in local feeling and responsibility, that in the absence of compelling congressional direction, [courts] could not infer that Congress had deprived the States of the power to act.

Garmon, 359 U.S. at 243-244. Accordingly, these laws may only be preempted if Congress clearly indicates that this is its intention.[2]

> employee rights guaranteed by § 7, while § 8(a)(3) prohibits employers from discriminating on the basis of union membership. The Court of Appeals relied on the second prong of the Garmon test by finding that Chaulk's conduct was arguably prohibited by § 8(a) of the Act. Pet. App. 18A.

[2] Fighting discrimination has traditionally been important in Massachusetts. See generally, Heins, Massachusetts Civil Rights Law, 76 Mass. L. Rev. 26 (1991). Massachusetts was among one of the first states in the nation to outlaw racial discrimination in public accommodations, and it was also one of the earliest states (1946) to adopt a modern fair employment practices statute. Further, the Supreme Judicial Court has held:

> [the] clear purpose of G.L c. 151B [the Massachusetts anti-discrimination statute]

There is no compelling indication that Congress intended that state law claims of sex discrimination should be preempted by the NLRA. To the contrary, the structure of this federal law makes clear that Congress intended state anti-discrimination statutes to play a significant role in eradicating discriminatory practices from the workplace.

Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e et seq. (1994 Ed.), the federal counterpart to Mass. G.L. c. 151B, expressly reserves to the states the right to enforce their own fair employment practices laws. 42 U.S.C. § 2000e-7 (1994 Ed.). Moreover, Congress even went so far as to integrate state law into the federal scheme by requiring federal complainants to seek redress initially under state law. 42 U.S.C. § 2000e-5(c) (1994 Ed.).

Indeed, this Court has recognized the significance of the states in the enforcement of our discrimination laws. It has noted that Title VII was designed to "supplement, rather than supplant, existing laws and institutions relating to employment discrimination." Alexander v. Gardner-Denver, 415 U.S. 36, 48-49 (1974). In view of the pivotal role Congress has given to state anti-discrimination laws in the prosecution of all discrimination claims, the plausible inference is that Congress did not intend to preempt these laws by the NLRA.

> is to implement the right to equal treatment guaranteed to all citizens by the constitutions of the United States and the Commonwealth.

Katz v. Massachusetts Commission Against Discrimination, 312 N.E.2d 182, 187 (1974)

Finally, as Judge Lynch pointed out in her well-reasoned dissent, in Brown v. Hotel & Restaurant Employees, International Union Local 54, 468 U.S. 492, 509 (1984), this Court held that a New Jersey law regulating the electoral qualifications for union representatives in the casino industry was not preempted by §7 of the NLRA. The Court found that sections 504 and 603(a) of the Labor-Management Reporting and Disclosure Act of 1959, 29 U.S.C. §401 et seq. at §§504 and 523(a)(LMRDA)(1994 Ed.), specifically allowed for state regulation as to these qualifications. The LMRDA's reservation of states' rights in this area evidenced Congress' intent that employees' rights to select representatives of their choice under §7 of the NLRA was not absolute. In light of the Congress' reservation of the states' rights to enforce the anti-discrimination laws in Title VI, a similar analysis is warranted here.

II. Inasmuch As Preemption Here Would Deny Victims Of Discrimination The Ability To Obtain Their Full Rights And Remedies Under Anti-Discrimination Laws, It Is Wholly Inappropriate

The Court should also be aware that, if it denies the petitioner's writ, such a denial will adversely affect discrimination victims. These victims will be prevented from attaining their full rights presently granted to them under state law. At the same time, those same rights will not be fully protected by the NLRA.

Under Massachusetts law, complainants who prove that their employers discriminated against them on the basis of gender may be awarded both compensatory and punitive damages. Mass. G.L. c. 151B, § 9. See, Fontaine v. Ebtec Corp., 613 N.E.2d 881, 887-890 (1993). These same damage remedies are also available to complainants under Title VII. 42 U.S.C. § 1981a(a)(1994 Ed.).

The above remedies are not available under the NLRA, however. Under § 10(c) of the NLRA, the remedial authority of the Act's enforcement arm, the NLRB, only allows it to "take such affirmative action . . . as will effectuate the policies of this Act." 29 U.S.C. §160(c)(1994 Ed.). This power has been interpreted to limit the Board to issuing remedies which restrain violations of the Act. Consolidated Edison Co. of New York v. NLRB, 305 U.S. 197, 219-220 (1938).

Though the Board is allowed discretion to make compensatory awards, these are largely limited to awards of backpay, with some exceptions for extraordinary violations. Awards for pain and suffering are beyond the Board's authority. See generally, Douglas S. McDowell, NLRB Remedies For Unfair Labor Practices, Labor Relations and Public Policy Series, Report No. 12 (1974). Likewise, the Board has no authority to award punitive damages. Consolidated Edison, 305 U.S. at 219-220.

The denial of damage remedies to individual discrimination victims is in direct conflict with Massachusetts' judgment that these victims are entitled to more complete compensation than is warranted under the NLRA. More importantly, however, the damage remedies in a discrimination case are central to ensuring the eradication of discrimination in the workplace inasmuch as these remedies deter employers from engaging in discriminatory practices. Albemarle Paper Company v. Moody, 422 U.S. 405 at 418 (1975). Thus, the public at large is hurt if the NLRA is allowed to preempt state anti-discrimination laws.

Similarly, federal labor preemption is unwarranted here because it would severely limit the ability of complainants to obtain attorney's fees. As with damages remedies, both Chapter 151B and Title VII allow victims to collect awards for attorney's fees if they are able to prove discrimination. Mass. G.L. c. 151B, § 9; 42 U.S.C.

§ 2000e-5(k) (1994 Ed.). Like damage awards, these fee awards contribute in a very meaningful way to achieving the goal of a discrimination-free workplace by ensuring that victims who might not otherwise be able to afford legal counsel will be able to obtain representation. However, in contrast to the Massachusetts discrimination laws, the established practice of the Board under the NLRA is to award attorney's fees only in the case where a employer asserts a patently frivolous defense. Heck's Inc., 215 NLRB 765 (1974). Thus, in order that victims of discrimination continue to have realistic and viable avenues to obtain representation in the prosecution of their cases, NLRA preemption should not be applied to these laws.

III. The Court Of Appeal's Decision Has Erroneously Applied The Law Of Federal Labor Preemption As This Court Has Interpreted It

The final reason for granting the petition is that the Court of Appeals' decision is in conflict with other controlling precedent of this Court. In holding that Ms. Doulamis' gender discrimination claim before the MCAD was preempted by the NLRA, the Court of Appeals relied, not only on San Diego Building Trades v. Garmon, 359 U.S. 236 (1959), but also on Sears, Roebuck and Co. v. San Diego County District Council of Carpenters, 436 U.S. 180 (1978). In doing so, the Court clearly misapplied Sears, Roebuck, as well as Garmon.

Inasmuch as sex discrimination, the conduct at issue in this case, is not protected by the NLRA, the Court recognized that it must use the standard established by Sears, Roebuck for conduct which is "arguably prohibited" by the NLRA. Pet. App. 21A-25A. For Garmon preemption to apply under this standard:

> the critical inquiry . . . is not whether the state is enforcing a law specifically relating to labor relations or one of general application but whether the controversy presented to the state court is identical to . . . or different from . . . that which could have been presented . . . to the Labor Board.

Sears, Roebuck, 436 U.S. at 197 (emphasis added).

After evaluating Doulamis' claim in light of the Sears, Roebuck standard, the Court of Appeals concluded that her claim before the MCAD was "the same in a fundamental respect" with the Union's unfair labor practice charges before the Board. Pet. App. 24A. The Appeals Court based its decision on Doulamis' allegation that she was targeted for harassment for union activities to the exclusion of other male union supporters. Significant to the Court's analysis was the fact that the Board had assumed jurisdiction over the Union's unfair labor practice charges against Chaulk, that Doulamis' claim arose out of the same factual setting as these charges, and that the MCAD would necessarily have to make a determination as to whether Doulamis was engaged in protected union activities in order to resolve her complaint. Pet. App. 21A-25A.

The Court's approach, however, completely misinterpreted Sears, Roebuck. When the conduct at issue is arguably prohibited by the NLRA, the critical factor is whether the controversies are identical, not whether they are related or that they arise out of a common factual setting. Sears, Roebuck, 436 U.S. at 194-97. Thus, whether the Board has or has not assumed jurisdiction over the Union's charges is of no relevance in and of itself. What matters is the specific inquiry the respective agencies would make as they investigate the allegations.

In the Union's case before the Board, the focus of inquiry would be whether Chaulk had threatened Doulamis with dismissal because of her union activities. See, Frick Paper Co. 319 NLRB No.3 (1995). In contrast, the MCAD's investigation would focus upon whether Doulamis was treated differently from the other men who were engaged in union activities, and, if so, whether this treatment was gender motivated. See, Beal v. Board of Selectmen of Hingham, 646 N.E.2d 131(1995); Rideout v. Crum & Forster Commercial Ins., 633 N.E.2d 376(1994). Indeed, in this respect, Doulamis' MCAD claim is fundamentally no different than if she were alleging that Chaulk had allowed its male employees to eat in the break room, while at the same time prohibiting women from doing so; or that Chaulk allowed the men to violate work rules and yet enforced the same rules against the women.

Moreover, the fact that the Court of Appeals found that there were common facts between the claims before the Board and the MCAD is not determinative. Factual parallelism in and of itself does not militate for preemption in "arguably prohibited" cases. Rather, preemption hinges on whether the legal analysis to be applied to the facts would be the same. See, Lingle v. Norge Division of Magic Chef, Inc., 486 U.S. 399, 408-410 (1988); Sears, Roebuck, 436 U.S. at 196-197.

Finally, as the above discussion has made clear, the MCAD would not have to make any determinations as to whether Doulamis was engaging in protected union activities in order to resolve her complaint. All the MCAD would need to determine is whether Doulamis was treated differently from the men because she was a women. Indeed, the MCAD was specific on this point in its order denying Chaulk's motion to dismiss.

Thus, the Court of Appeals's preemption analysis was fundamentally wrong. It more closely resembled the standard

established by Sears, Roebuck for conduct "arguably protected" by the NLRA. This standard focuses merely on whether the NLRB has clear jurisdiction over the controversy and whether the state action clearly poses dangers for the integrity of that jurisdiction.

In view of the fundamental differences between the two claims, there is no basis for concluding that MCAD jurisdiction would pose any danger of conflict with the Board's. Accordingly, Garmon preemption is inapplicable. Inasmuch as the Court of Appeals misapplied U.S. Supreme Court precedent, as well as Massachusetts precedent, this Court should grant review.

CONCLUSION

The serious errors in the decision of the Court of Appeals, combined with the conflicts with other decisions and the important public interests affected by the decision, warrant review of that decision by this Court. For the foregoing reasons, NELA

respectfully requests the Court to grant the petitioner's writ of certiorari.

Respectfully Submitted,

Douglas A. Hedin
Attorney At Law
812 One Financial Plaza
120 South Sixth Street
Minneapolis, MN 55402
(612) 333-7700
Counsel of Record

Jonathan L. Gould
Gould, Livingston, Adler
& Pulda, P.C.
557 Prospect Avenue
Hartford, CT 06105
(860) 233- 9821

Dated May 13, 1996